Supreme Court, U.S.
FILED

No. 03-655 OCT 27 2003

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In The

Supreme Court of the United States

AUDIE DENVER WHEELER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHERE THE INDICTMENT CHARGED HIM WITH CONSPIRING TO DISTRIBUTE LARGE QUANTITIES OF COCAINE AND MARIJUANA OVER A SIX YEAR PERIOD, SHOULD DEFENDANT'S CONSPIRACY CONVICTION BE OVERTURNED WHEN THE EVIDENCE ONLY ESTABLISHED LARGELY INDIVIDUALIZED SALES OF MARIJUANA OVER A THREE YEAR PERIOD?

B. WAS DEFENDANT PREJUDICED BY HIS TRIAL ATTORNEY'S FAILURE TO CHALLENGE THE CONSPIRACY CHARGE THROUGH A TIMELY MOTION FOR A NEW TRIAL?

C. WAS EVIDENCE INTRODUCED AT TRIAL IMPLYING THAT DEFENDANT WAS ASSOCIATED WITH A WELL KNOWN, VIOLENT STREET GANG UNFAIRLY PREJUDICIAL?

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OPINIONS AND RULINGS BELOW

Defendant presents questions regarding the viability of his conspiracy conviction, the effectiveness of his trial attorney, and the propriety of the introduction of evidence implying that he was associated with a local street gang. The Trial Court did not issue a written opinion addressing Defendant's F.R.CRIM.PROC. 29 challenge to the conspiracy charge, choosing instead to rule from the bench. (App. pp. 47-52). Although it did not squarely address whether counsel's performance violated Defendant's constitutional rights, the Trial Court did issue an unpublished opinion sanctioning counsel for reckless conduct. (App. pp. 53-61). The Trial Court did not issue a written opinion regarding Defendant's evidentiary claim, but did address the issue on the record. (App. pp. 38-46). In affirming Defendant's conviction and judgment of sentence, the United States Court of Appeals for the Sixth Circuit issued an unpublished opinion dated May 29, 2003 (App. pp. 1-24), and an order dated July 30, 2003 denying his petition for rehearing. (App. pg. 37).

STATEMENT OF JURISDICTION

Judgment was entered against Defendant on June 6, 2001. (App. pp. 25-33). A timely Notice of Appeal was filed. (R 128: Notice of Appeal). On May 29, 2003, the United States Court of Appeals for the Sixth Circuit issued an unpublished opinion affirming the Trial Court's judgment of conviction and sentence. (App. pp. 1-24). Fourteen days later, Defendant mailed a Petition for Panel Rehearing dated June 12, 2003 to the Court of Appeals. Although F.R.APP.PROC. 25(a)(2)(B)(i) provides that the filing of briefs and joint appendices is complete upon mailing, the

Court of Appeals treats petitions for rehearing differently. Petitions are deemed filed upon receipt by the clerk. Since the Court of Appeals did not receive the Petition for Panel Rehearing until June 16, 2003, it requested that Defendant file a motion seeking leave to file the petition out of time. Defendant obliged (App. pp. 34-35) and the motion was granted in an order dated June 26, 2003. (App. pg. 36). Under the circumstances, Defendant's Petition for Panel Rehearing should be considered timely for the purpose of complying with SUP.CT.R. 13.3. In an order dated July 30, 2003, the Court of Appeals denied the petition for rehearing. (App. pg. 37). Jurisdiction to review Defendant's conviction is conferred on this Court by SUP.CT.R. 10(c).

CONSTITUTIONAL PROVISIONS AND RULES OF EVIDENCE INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S.CONST.AMEND.V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S.CONST.AMEND.VI.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.R.EVID. 403.

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

F.R.EVID. 404(b).

STATEMENT OF THE CASE

Defendant was indicted for committing criminal offenses against the laws of the United States. The Trial Court had jurisdiction over his case under 18 U.S.C. § 3231. Defendant was ultimately tried pursuant to a fifth superseding indictment for conspiring to distribute cocaine and marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1) [count I], possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) [count II], four counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) [counts III, V, VI and VII], being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g) [count VIII], and witness tampering in violation of 18 U.S.C. § 1512(b) [count IX]. (R 78: Fifth Superseding Indictment). Count IV of the fifth superseding indictment did not relate to Defendant. On October 10, 2000, the first day of trial, an order was entered allowing the Government to voluntarily dismiss the witness tampering charge. (R 85: Order Dismissing Count Nine of the Fifth Superseding Indictment).

Defendant's jury trial proceeded over a period of approximately two weeks. The Government's proofs with respect to the alleged conspiracy to distribute cocaine and marijuana consisted of testimony from Defendant's acquaintances and customers regarding the sale of contraband over a long period of time in Genesee County, Michigan. The marijuana distribution charge, as well as one of the felon in possession of firearm charges, arose out of an instance on October 1, 1998 during which police searched a house at 426 East Parkway, Flint, Michigan, found Defendant in one of the bedrooms, and uncovered firearms and a relatively small quantity of marijuana. (R 78: Fifth Superseding Indictment). The remaining counts,

all firearm and/or ammunition charges, relate to specific instances where these items were found on or near Defendant.

At the close of the Government's proofs, Defendant made an oral motion for judgment of acquittal pursuant to F.R.CRIM.PROC. 29. (October 18, 2001, Jury Trial, Attorney/Trial Court Colloquy at TR pp. 132-33). After hearing extensive oral arguments from both sides, the Trial Court denied the motion on all applicable counts except for the conspiracy count. That portion of the motion was taken under advisement. (October 24, 2000, Motion Hearing, Ruling on Motion at TR pg. 29). Shortly after the jury rendered its verdict, the District Court denied the remainder of the motion as it pertained to the conspiracy charge. (October 26, 2001, Ruling on Motion, Attorney/Trial Court Colloquy at TR pp. 45-46, App. pp. 47-52).

On October 26, 2002, the jury found Defendant guilty of conspiring to distribute at least 100 kilograms of marijuana, possessing with the intent to deliver marijuana, and four firearm/ammunition counts. (R 95: Verdict Form, App. pp. 62-63). He was found not to have conspired to distribute cocaine and was acquitted of one count of being a felon in possession of a firearm. (*Id.*). Defendant was subsequently sentenced to incarceration for a period of 365 months (R 126: Judgment, App. pp. 25-33), and appealed as of right to the United States Court of Appeals for the Sixth Circuit. (R 128: Notice of Appeal). On May 29, 2003, the Court of Appeals issued an unpublished opinion affirming the Trial Court's judgment of conviction and sentence. (App. pp. 1-24). Defendant then filed a Petition for Panel Rehearing seeking reconsideration of the adverse

decision. In a summary order dated July 30, 2003, the Court of Appeals denied the petition. (App. pg. 37).

ARGUMENT

A. WHERE THE INDICTMENT CHARGED HIM WITH CONSPIRING TO DISTRIBUTE LARGE QUANTITIES OF COCAINE AND MARIJUANA OVER A SIX YEAR PERIOD, DEFENDANT'S CONSPIRACY CONVICTION SHOULD BE OVERTURNED WHEN THE EVIDENCE ONLY ESTABLISHED LARGELY INDIVIDUALIZED SALES OF MARIJUANA OVER A THREE YEAR PERIOD.

The fifth superseding indictment charged in pertinent part:

> That from about 1994 until the return of this indictment [10-4-2000], AUDIE DENVER WHEELER, having been convicted in Genesee County Circuit Court in 1995 of the felony drug offense of possession with intent to deliver cocaine, and TIARA RAE TATRO, defendants herein, did knowingly, intentionally, and unlawfully conspire, combine, confederate and agree with each other and other persons, both known and unknown to the Grand Jury, to distribute five kilograms or more of cocaine, a Schedule II controlled substance, and 1000 kilograms or more of marijuana, a Schedule I controlled substance; in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

Although the jury found Defendant not guilty of having conspired to distribute cocaine, and not guilty of having conspired to distribute 1,000 kilograms or more of marijuana, it did convict him of conspiring to distribute at least

100 kilograms of marijuana. Prior to the verdict, the defense had raised a timely motion for judgment of acquittal; the Trial Court had taken the portion of the motion pertaining to the conspiracy charge under advisement. After the verdict, the Trial Court heard brief arguments and denied the remainder of the motion. In Defendant's brief on appeal, during oral argument in the Court of Appeals and in the petition for panel rehearing, the defense asserted that the evidence presented at trial was insufficient to establish that Defendant agreed to distribute 100 kilograms or more of marijuana.

In federal cases, convictions must be reversed where no rational trier of fact could find guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 317 (1979). In light of the lack of evidence showing that he distributed 100 kilograms of marijuana as part of an agreement, Defendant's conspiracy conviction violates his right under U.S.CONST.AMEND. V against deprivation of liberty without due process of law. Only small quantities of seized drugs were entered into the record in this case: GX 13, a laboratory report analyzing .4 grams of marijuana seized from Defendant while in an automobile on April 4, 1995 (October 11, 2000, Jury Trial, Navidonski at TR pp. 154-56); GX 45, a laboratory report analyzing 55.5 grams of marijuana seized from Chad Lamson and his mother after they left 426 East Parkway the day before it was raided (October 13, 2000, Jury Trial, Meyer at TR pp. 55-57); GX 46, a laboratory report analyzing quantities of 264.6 grams, 54.2 grams and 53.9 grams of marijuana seized from the Parkway residence (October 12, 2000, Jury Trial, Joseph at TR pp. 80-82); GX 71, a laboratory report analyzing 5.65 grams of marijuana seized from 2007 Morgan, Vienna Township, Michigan (October 18, 2000,

Jury Trial, Bowden at TR pg. 112); and GX 107, a laboratory report analyzing 26.8 grams of marijuana seized from a car leaving 2007 Morgan (October 12, 2000, Jury Trial, Krish at TR pg. 19). The Government was thus forced to rely on circumstantial evidence in hopes of obtaining a conviction for the distribution of high quantities of marijuana under 21 U.S.C. § 841(b)(1)(A) or (B). The Government asserted that, during the period of the alleged conspiracy, Defendant had 49 months to distribute marijuana. It arrived at this number by subtracting each period of time in which Defendant was incarcerated from the total life span of the alleged conspiracy. The Government then converted 49 months to 196 weeks. It conjectured that, if Defendant sold two pounds of marijuana per week over a 196 week period, the attributable quantity of marijuana exceeded 220 pounds (or 100 kilograms). (October 24, 2000, Jury Trial, Government's Closing Argument at pp. 87-88).

In order to establish a factual basis for arguing these numbers, the Government provided testimony from its star witness: Wesley Reade Haley. Haley testified about living with Defendant at four different residences: (1) Churchill Street, for three to four months starting in December 1997 (October 17, 2000, Jury Trial, Haley at TR pg. 112); (2) the Fenton Road trailer park, from March to June or July in 1998 (*Id.*, at TR pg. 119); (3) 426 East Parkway, from July through the end of September in 1998 (*Id.*, at TR pg. 121); and (4) 2007 Morgan Street, from July 1999 to April 2000 (*Id.*, at TR pg. 132). He testified that, while at the residence on Churchill Street, Defendant sold "no more than maybe a couple pounds per week" of marijuana. (*Id.*, at TR pg. 117). During that time, Defendant did not receive help selling drugs from other people. (*Id.*,

at TR pg. 114). Likewise, when Haley resided with him at the Fenton Road trailer park, Defendant was the one involved in selling similar quantities of marijuana. (*Id.*, at TR pg. 120). In contrast, Haley testified that, when he stayed at 426 East Parkway with Defendant and his friend, Marcus Funches, there was an agreement between Defendant and Funches to sell marijuana. According to Haley, "Audie usually had Marcus conduct the business for him so to speak or Audie would go in there in Marcus' room to conduct the business." (October 17, 2000, Jury Trial, Haley at TR pg. 125). When asked about the quantities of marijuana trafficked out of the 426 East Parkway residence, Haley testified that "maybe three or four pounds a week" were sold. (*Id.*, at TR pg. 121). Thus, over a 12 week period, judging the facts in a light most favorable to the Government, no more than 48 pounds, or 21.82 kilograms, of marijuana could be attributed to Defendant for his actions in relation to 426 East Parkway.

Haley testified that Defendant sold between five and ten pounds of marijuana per week while he lived at 2007 Morgan. (October 17, 2000, Jury Trial, Haley at TR pg. 133). Without elaboration, Haley also testified that Defendant's girlfriend, Tiara Tatro, transported marijuana for him. (October 17, 2000, Jury Trial, Haley at TR pg. 122). Specifically, he stated, "I mean she would – she would like – as of the last year or so she would transport for Audie just because of the fact him not having a license." (*Id.*). Tatro, although conceding that she smoked marijuana with Defendant on occasion, denied selling marijuana for him out of the Morgan Street residence. (October 20, 2000, Jury Trial, Tatro at TR pg. 45). Haley did not point out specific instances when the marijuana was transported by Tatro. Nor did he articulate the quantities of marijuana

which Tatro allegedly transported. Haley's vague, uncorroborated allegation regarding Tatro's involvement does not constitute substantial and competent evidence of an agreement between Defendant and Tatro.

Even if an agreement between the two had been established, the record indicates no more than a single conspiracy between Defendant and Tatro while they stayed at 2007 Morgan. Haley's testimony did not show that Tatro made alleged deliveries prior to 1999, during the period in which Defendant and Funches sold marijuana together at the Parkway residence. Defendant's purported agreement with Funches, and his purported agreement with Tatro were never tied together. In fact, Funches was incarcerated during the period in which Defendant and Tatro stayed at 2007 Morgan (*See* October 19, 2000, Jury Trial, Funches at TR pp. 13-14), and was not "in the picture." (October 17, 2000, Jury Trial, Haley at TR pp. 133-34). At best, Haley's testimony establishes the existence of two separate conspiracies – one between Defendant and Funches while they sold marijuana out of the residence at 426 East Parkway, and a separate one between Defendant and Tatro while they resided at 2007 Morgan. Since a trier of fact must keep distinct conspiracies distinct, *Kotteakos v. United States*, 328 U.S. 750, 769-70 (1946), any quantity of marijuana distributed out of the 426 East Parkway residence should not have been aggregated with the marijuana sold out of the 2007 Morgan residence.

Haley never testified about his own involvement in Defendant's alleged drug conspiracy. The Government tried to use the testimony of Chad Lamson, another former friend of Defendant's, to establish Haley's role in the conspiracy. But when Lamson was questioned as to

whether Haley was involved in the sale of drugs he replied, "No." (October 17, 2000, Jury Trial, Lamson at TR pg. 94). Much was made of Haley's purported role as Wheeler's bodyguard:

Q What was his role there from what you were able to ascertain?

A He was pretty much the brut squad. If he needed someone –

THE COURT: He was what?

A The brut squad. If he needed someone to fight him, he'd tell Reade to go fight them.

Q All right. Sort of a bodyguard you said?

A More or less.

(*Id.*). However, Lamson's testimony did not establish whether Haley ever actually fought anyone on Wheeler's behalf for the purpose of furthering the alleged conspiracy. Being a "brut" or a bully is not, in and of itself, synonymous with involvement in the drug trade. The Government also tried to utilize Lamson's testimony in order to help establish the existence of the broad conspiracy charged in the Fifth Superseding Indictment. Although the record indicates that Defendant sold marijuana to Lamson in ½ ounce to 1 ounce quantities (October 17, 2000, Jury Trial, Lamson at TR pg. 80), that over time Lamson purchased "probably a half pound, quarter pound" of marijuana from Defendant (*Id.*, at TR pg. 81), and that Defendant was a "reliable supplier" for Lamson while he was selling controlled substances (*Id.*, at TR pg. 98), Lamson denied having conspired with Defendant:

Q Did you ever – did Wheeler ever ask you to deliver some drugs for him?

A No.

Q Did you ever help him out as far as you're concerned in terms of this drug trafficking besides buying for yourself?

A No.

(*Id.*).

Defendant asserts that the evidence presented to the jury was insufficient to establish the distribution of 100 kilograms of marijuana. Although the Government has arguably established the distribution of at least 100 kilograms of marijuana through averaging quantities out over time, the evidence does not show that such a large quantity was distributed pursuant to an illicit agreement. In regard to the existence of an agreement, the Government argued that Defendant had a conspiratorial relationship with Haley, Funches, Tatro and Lamson. The Court of Appeals held: "[t]he jury found that [Defendant] had conspired to distribute between 100 and 1,000 kilograms of marijuana within a given range and that verdict will stand." (Opinion at pp. 10-11, App. pg. 12). It further concluded that a conspiracy had been established, noting that "the Government presented extensive evidence, including testimony from Haley, Tatro, and Marcus Funches that there was an agreement to distribute marijuana between Wheeler and these witnesses." (*Id.* at pg. 9). However, Tatro and Funches, both defense witnesses, testified against the existence of a conspiracy and, at most, established that Defendant had smoked marijuana with them. Haley, the only Government witness of the three, testified that Defendant sold large quantities of controlled

substances, but only competently established a three month conspiracy which involved the distribution of no more than 48 pounds (21.82 kilograms) of marijuana. Under the evidence presented to the jury, a rational trier of fact could only convict Defendant of conspiring to distribute less than 100 kilograms of marijuana.

B. DEFENDANT WAS PREJUDICED BY HIS TRIAL ATTORNEY'S FAILURE TO CHALLENGE THE CONSPIRACY CHARGE THROUGH A TIMELY MOTION FOR A NEW TRIAL.

Claims of ineffective assistance of counsel are grounded in the U.S.CONST.AMEND. VI requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In order to succeed, constitutionally ineffective assistance of counsel claims must establish that a criminal defendant's attorney performed deficiently, and that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficiency, there must be a showing that counsel's performance fell below an objective standard of reasonableness. *Id.*, at 688. To establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Here, Defendant's trial attorney erred by failing to sufficiently challenge both the factual basis for the conspiracy conviction and the propriety of the manner in which it was obtained.

After the jury rendered its verdict, the Trial Court addressed Defendant's F.R.CRIM.PROC. 29 claim that, although the Fifth Superseding Indictment alleged his involvement in a conspiracy beginning in 1994 and ending

in 2000, there was no evidence that he sold marijuana between the years 1994 and 1997. (October 26, 2000, Jury Trial, Attorney/Trial Court Colloquy at TR pp. 41-46, App. at pp. 47-52). The Trial Court found that there was sufficient evidence to submit the conspiracy case to the jury and accordingly denied counsel's motion. (October 26, 2000, Jury Trial, Ruling at TR pp. 45-46, App. pp. 51-52). It invited him, however, to file a motion for a new trial. (*Id.* at TR pg. 46, App. pg. 52). Counsel should have accepted the Trial Court's invitation to file a motion for a new trial pursuant to F.R.CRIM.PROC. 33, or should have filed either a renewed motion for judgment of acquittal or a motion for reconsideration. A motion for a new trial based on the verdict being against the "manifest weight of the evidence" may be granted when the government has presented sufficient evidence to convict, but the trial judge disagrees with the jury's resolution of conflicting evidence. *See Tibbs v. Florida*, 457 U.S. 31, 42 (1982). In the Sixth Circuit, when addressing a motion for a new trial based on conflicting evidence, the trial judge may act in the role of a "thirteenth juror" to consider the credibility of witnesses and the weight of the evidence. *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988).

As shown above, given the lack of testimony showing agreements (as opposed to mere buyer-seller relationships) between anyone but Defendant and Funches while they stayed at 426 East Parkway, the evidentiary basis for the jury's conclusion that Defendant sold at least 100 kilograms of marijuana in furtherance of a conspiracy should have been the subject of further challenge by counsel. A motion for new trial would have allowed the Trial Court to resolve the conflict between Haley's testimony that Tatro delivered marijuana for Defendant, and Tatro's denial of involvement. If the Trial Court had found that the Government failed to link Tatro to the conspiracy, then the

highest quantity of marijuana attributable to Defendant under Count I would have been the 48 pounds, or 21.82 kilograms, distributed over the twelve week Parkway period. Alternatively, a renewed motion for judgment of acquittal or motion for reconsideration would have allowed counsel to describe in more factual detail why no rational trier of fact could convict Defendant of conspiring to distribute 100 kilograms of marijuana based on the evidence presented to the jury. Counsel never filed a subsequent motion challenging the factual basis for the conspiracy conviction.[1] This failure was objectively unreasonable and deprived Defendant of his Sixth Amendment right to assistance of counsel.

Likewise, counsel should have renewed and expounded his challenge to the variance between the conspiracy alleged in the indictment and the conspiracy proven at trial. Count I of the fifth superseding indictment charged Defendant with conspiring with Tiara Tatro and "other persons, both known and unknown to the Grand Jury," to distribute five kilograms or more of cocaine and 1,000 kilograms or more of marijuana from "about 1994" until October 2000. Those quantities correspond to the quantities necessary to obtain a maximum sentence under

[1] After Defendant was sentenced, counsel did file a motion for a new trial, but alleged that the foreperson of the jury had improper communications with persons outside the jury during the course of the trial. In its response, the Government showed that counsel had dismissed the individual accused of improperly discussing the case from the pool of potential jurors by exercising a peremptory challenge before the jury was impaneled. The Trial Court ultimately entered an order sanctioning counsel for recklessly filing the motion. (August 15, 2001, Opinion and Order, App. at pp. 53-62).

21 U.S.C. § 841(b)(1)(A). Although the object of the conspiracy charged in the indictment was to distribute at least five kilograms of cocaine and at least 1,000 kilograms of marijuana, the jury was given *carte blanche* to select what quantity of cocaine, marijuana, or both, Defendant conspired to distribute. (R: 95, Verdict Form, App. at pp. 62-63). While this approach might arguably be proper in cases involving substantive violations of 21 U.S.C. § 841, in conspiracy cases it creates the danger that the requisite line dividing distinct conspiracies will be eliminated. *See Kotteakos*, 328 U.S. 750, 769-70. The Government should not have been allowed to allege a broad, six year conspiracy consisting of Defendant's dealings with a number of different individuals in hopes of obtaining a maximum sentence under the federal drug statute. This Court has cautioned that "[c]harges of conspiracy are not to be made out of piling inference on inference thus fashioning . . . a dragnet to draw in all substantive crimes." *Direct Sales v. United States*, 319 U.S. 703, 711 (1943). Here, counsel unreasonably failed to take advantage of his final opportunity to illuminate the fundamental defect in the conspiracy charge: charging a defendant with being involved in an exceedingly broad conspiracy, yet giving the jury the option to choose the object of the conspiracy without regard to the length of the conspiracy's life, deprives the defendant of having reasonable notice of the charges against him and a meaningful opportunity to defend against those charges.

Defendant was sentenced under 21 U.S.C. § 841(b)(1)(B) to a term of 365 months for conspiring to distribute at least 100 kilograms of marijuana. Since Defendant had a prior felony drug conviction, his applicable statutory sentencing range was "not less than 20 years or more than

life." *Id.* Defendant's sentencing guideline range as determined by the Trial Court was 292 months to 365 months. (Judgment at pg. 8, App. at pg. 32). Since the verdict form did not give the jury the option of attributing to Defendant a marijuana quantity range equal to or greater than 50 kilograms and less than 100 kilograms, he could not have been convicted of violating 21 U.S.C. § 841(b)(1)(C) without running afoul of the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Thus, had counsel successfully mounted a challenge to the jury's conclusion that he had conspired to distribute at least 100 kilograms by arguing that the conclusion was contrary to the evidence, he would have limited Defendant's maximum statutory exposure to "not more than 10 years." *See* 21 U.S.C. § 841(b)(1)(D). A twenty year sentence disparity clearly qualifies as a difference in outcome under *Strickland*. Accordingly, this Court should find that counsel's ineffectiveness for failing to further challenge the merits of the conspiracy conviction was objectively unreasonable and calls for reversal.

C. EVIDENCE INTRODUCED AT TRIAL IMPLYING THAT DEFENDANT WAS ASSOCIATED WITH A WELL KNOWN, VIOLENT STREET GANG WAS UNFAIRLY PREJUDICIAL.

Early in the trial, the Government introduced through the testimony of Flint Police Officer Shawn Ellis pieces of paper with graffiti on them, one bearing the words "Spanish Cobra Killa"; contemporaneously, pictures of Defendant and Chad Lamson were introduced. (October 11, 2000, Jury Trial, Ellis at TR pp. 62-64, App. pp. 38-41). The papers and pictures had been seized from the residence at 426 East Parkway on October 1, 1998. Officer Ellis opined that the words on the papers appeared to be

gang graffiti. Ellis noted that "killa" was slang for being a killer. He further explained that the "Spanish Cobras" were a street gang which congregated on the East side of Flint, Michigan.

Although he did not initially object to the introduction of the papers and pictures, as soon as the Government attempted to connect the graffiti with the pictures of Defendant and Lamson, defense counsel asked to approach the bench and voiced his objection. (October 11, 2000, Jury Trial, Attorney/Trial Court Colloquy at TR pp. 64-69, App. pp. 41-45). Counsel argued that the evidence was prejudicial because the Government had no real evidence that Defendant was involved in gang related activity. The Trial Court conceded that the Spanish Cobras were well known in the Flint area, but did not strike the exhibits from the record, apparently because they were already in evidence.

On appeal, Defendant challenged the introduction of the gang related evidence, arguing that it was unfairly prejudicial. The Court of Appeals agreed, stating, "The introduction of evidence of Wheeler's gang involvement appears to have no probative value as to the charge of conspiracy to distribute marijuana." (Opinion at pg. 5, App. pg. 6). Although the Court of Appeals found the admission of the evidence to be erroneous, it concluded that the error was harmless because witness testimony and evidence seized from Defendant's residence showed that he was involved in a drug conspiracy. (*Id.*).

Generally, evidence of other crimes, wrongs or acts may not be admitted to prove bad character so as to lead to an inference of action in conformity therewith. F.R.EVID. 404(b). Other acts evidence may, however, be offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

When offered for a proper purpose, other acts evidence may be admitted if the other act is probative of a material issue other than character, and if the probative value of the other act evidence is not substantially outweighed by the prejudicial effect it may have on the trier of fact. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988). Here, any marginal probative value the gang references may have had was substantially outweighed by its tendency to create a jaundiced perception of the Defendant in the minds of the jurors. Defendant was alleged to have conspired to distribute cocaine and marijuana with his girlfriend and his friends – not with a notoriously violent group of street thugs. The timing of the introduction of the gang references in this case is important. Officer Ellis was the first witness to testify in the Government's case in chief. While the gang references brought out during Ellis's testimony did not bear upon whether Defendant and his acquaintances agreed to sell controlled substances, they almost certainly affected the jury's ability to presume him innocent until proven guilty. The case against Defendant did not include allegations of murder or racketeering. Yet images of such crimes usually come to mind when violent street gangs are discussed.

In *Berger v. United States*, 295 U.S. 78 (1935), a conspiracy case involving improper argument to the jury by a prosecutor, this Court noted that it is as much a United States Attorney's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*, at 88. The Court observed that the average juror "has confidence that these obligations, which so plainly rest upon the prosecuting attorney," will be carried out. *Ibid.* Although the instant case involves only a single instance of dialogue between the prosecutor and the witness

regarding Defendant's purported involvement with the Spanish Cobras, the evidence was damaging. "In fashioning a harmless-constitutional-error rule, [courts] must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." *Chapman v. California*, 386 U.S. 18, 22 (1967). The fact that the prosecutor did not make further gang references does not necessarily excuse the initial mistake. The evidence was clearly intended to create the perception that, since he had papers with gang graffiti at the Parkway residence, Defendant was associated with the Spanish Cobras. Defendant's purported association with the Spanish Cobras likely led to the improper inference that he was involved in the conspiracy alleged in the indictment. Giving due consideration to the significant difference the conspiracy conviction made with respect to Defendant's ultimate sentence, the gang references should not have been discounted simply because the Government presented a thorough case, especially when much of the evidence presented dealt with individualized drug distribution rather than the existence of a conspiracy.

CONCLUSION

The necessary degree of convergence between the drug quantity attributable to a defendant and the existence of an agreement to distribute that quantity is an important question which will arise repeatedly. Before *Apprendi*, the existence of an agreement to distribute controlled substances was decided by the jury; the quantity distributed

was a sentencing factor decided by the trial judge. Now, quantity is a specific element which must be established in order for the jury to convict. This case presents an example of the profound effect a fine line distinction by the jury regarding quantity can have. So long as the federal system continues to deal with criminal drug offenders in its current manner (*i.e.*, the greater the quantity, the stiffer the sentence), the danger will remain that improper evidence will be introduced in order to establish overly broad conspiracies, and that speculative arguments will be made in order to inflate quantity totals. In cases involving drug conspiracies, federal appellate courts should uniformly scrutinize whether the existence of a specific agreement has been proven, and whether the distribution of a threshold quantity has been connected to that agreement. Since, in this case, the Government did not properly prove the distribution of 100 kilograms or more of marijuana pursuant to an agreement, Defendant's conspiracy conviction should either be vacated, or remanded with instructions to re-sentence him for violating 21 U.S.C. § 841(b)(1)(D). For these reasons, Defendant respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 01-1807

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. **AUDIE DENVER WHEELER,** *Defendant-Appellant.*	) **ON APPEAL**) **FROM THE UNITED**) **STATES DISTRICT**) **COURT FOR THE**) **EASTERN DISTRICT**) **OF MICHIGAN**) **OPINION**) (Filed May 29, 2003)

BEFORE: SUHRHEINRICH and COLE, Circuit Judges, CARR, District Judge.*

R. GUY COLE, JR., Circuit Judge. Defendant-Appellant Audie Denver Wheeler was convicted by a jury of conspiracy to distribute controlled substances, possession with intent to distribute marijuana, and being a felon in possession of firearms and ammunition. He was sentenced to a term of imprisonment of 365 months. Wheeler appeals his conviction for conspiracy to distribute marijuana. He argues that the district court erred in allowing Plaintiff-Appellee United States to introduce evidence of Wheeler's gang involvement and his ownership of pit bull

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

dogs. He also argues that his counsel rendered constitutionally ineffective assistance. Additionally, Wheeler appeals his sentencing enhancements for being found an organizer or leader, for the use of a minor to commit a crime, and for obstructing or impeding the administration of justice. For the reasons set forth below, we **AFFIRM** the judgment of conviction and sentence of the district court.

I. BACKGROUND

On October 4, 2000, a grand jury issued a Fifth Superseding Indictment charging Wheeler[1] with nine counts:

> Count 1: Conspiracy to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 846 and 841(a)(1)
>
> Count 2: Possession with Intent to Distribute Marijuana in violation of 21 U.S.C. § 841(a)(1)
>
> Count 3, 5, 6, 7: Felon in Possession of Firearm in violation of 18 U.S.C. § 922(g)
>
> Count 8: Felon in Possession of Ammunition in violation of 18 U.S.C. § 922(g)
>
> Count 9: Witness Tampering in violation of 18 U.S.C. § 1512(b)

[1] Wheeler's girlfriend, Tiara Rae Tatro, was named in the Indictment on Counts One, Two, Three, Four, and Eight. She pleaded guilty to Count Four, Possession of a Stolen Firearm in violation of 18 U.S.C. § 922(j). Wesley Reade Haley was named in Count Six. He pleaded guilty to Count Six and to Aiding and Abetting.

On October 10, 2000, the Government voluntarily dismissed Count Nine. On October 26, 2000, Wheeler was found guilty as to all Counts except Count Six, of which Wheeler was found not guilty. Regarding Count One, Wheeler was found guilty of conspiracy to distribute marijuana, but not guilty of conspiracy to distribute cocaine. A Presentence Investigation Report ("PSI") was prepared on December 4, 2000 and Wheeler filed objections on January 18, 2001. The PSI was revised on February 12, 2001 and Wheeler's Offense Level was assessed at 36. The district court held two sentencing hearings, on February 23, 2001 and May 24, 2001, in order to hear objections to the PSI and to sentence Wheeler. On May 24, 2001, the district court had an evidentiary hearing regarding the obstruction of justice enhancement and then sentenced Wheeler to a term of imprisonment of 365 months. The court filed a Judgment of Conviction and Sentence on May 29, 2001. Wheeler filed a timely notice of appeal on June 7, 2001.

II. ANALYSIS

A. Introduction of Evidence

Wheeler argues that his conviction for conspiracy to distribute marijuana should not be upheld because the district court erred in admitting evidence of Wheeler's gang involvement and ownership of vicious dogs. Wheeler argues that the evidence was inadmissible under Federal Rule of Evidence 404(b). That rule provides that:

> (b) Other Crimes, Wrongs, or Acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of

> motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED.R.EVID. 404(b) (2001). Wheeler argues that the evidence's probative value was outweighed by its prejudicial effect.

In *United States v. Mack,* 258 F.3d 548 (6th Cir. 2001), we settled a split within the Circuit concerning the proper standard of review for evidentiary rulings. We held that, in light of the Supreme Court's decision in *General Electric Co. v. Joiner,* 522 U.S. 136, 142-43 (1997), and our decision in *Trepel v. Roadway Express, Inc.,* 194 F.3d 708, 716 (6th Cir. 1999), all evidentiary rulings are to be reviewed for abuse of discretion. *Mack,* 258 F.3d at 553 n.1. Under that standard, we will not reverse a lower court's evidentiary ruling unless we find that the court has abused its discretion.

1. Evidence of gang involvement

Wheeler argues that the district erred in admitting into evidence sheets of paper that contained gang graffiti. The paper was seized on October 1, 1998 when a search warrant was executed at Wheeler's home. During the testimony of Officer Shawn Ellis of the Flint Police Department, the Government sought to admit the paper into evidence, and Ellis testified that the writing on the paper was "gang graffiti." The Government argued at trial that the sheets of paper were relevant to show that Wheeler

was involved in a conspiracy to distribute marijuana. The Government also argued that the paper was evidence of Wheeler's knowledge and specific intent rather than as evidence of character, and thus did not fall under FRE 404(b).

The testimony of Ellis was as follows:

Q All right. And are you familiar with gang – are you familiar with gangs in the Flint area?

A Somewhat, yes.

Q All right. Has that become an issue in terms of some of your investigations of narcotics as to what gangs are doing?

A Yes.

Q Okay. Is there a specific reference to a group on [exhibit] No. 37?

A Yes, these is.

Q Okay. And what is listed on there?

A It says Spanish Cobra killa [sic]?

. . .

Q All right. And what are Spanish Cobras?

A It is a gang, street gang which congregates mainly on the east side of Flint.

Wheeler's attorney objected, arguing that: (1) the evidence of Wheeler's gang involvement was 404(b) material and therefore he needed notice that it would be introduced, and (2) the evidence was prejudicial because it insinuated that Wheeler belonged to a gang. At a side bar during

trial, Wheeler's attorney stated that "the focus of my objection is to alleviate any further reference to gangs." The court noted that the Spanish Cobras were "well known here in Flint." The court allowed the admission of the evidence and added that if other matters were to come up regarding Wheeler's alleged association with a gang, objections could be made at that time. The issue of the Spanish Cobras or Wheeler's alleged gang involvement was never brought up again at the trial.

The introduction of evidence of Wheeler's gang involvement appears to have no probative value as to the charge of conspiracy to distribute marijuana. The evidence seems to create the inference of Wheeler's involvement in a drug conspiracy from his association with a notorious gang. Even the court noted that the Spanish Cobras were well known in Flint. Therefore, this testimony would appear to be prejudicial and the district court erred in admitting it.

Although we find that the district erred in admitting this evidence, we conclude that it was harmless error. Errors are harmless unless we determine that it is more probable than not that the error materially affected the verdict. *See United States v. Daniel,* 134 F.3d 1259, 1262 (6th Cir. 1998) (quoting *United States v. Fountain,* 2 F.3d 656, 668 (6th Cir. 1993)). There was extensive evidence that Wheeler was involved in a drug conspiracy with several people and that he ran a marijuana operation from his various residences. Moreover, no further testimony on the subject of gang involvement or graffiti was introduced and the other evidence of Wheeler's guilt, e.g., the witnesses' testimony and evidence seized from his residence, would tend to show that the error was harmless. Accordingly, we find that the introduction of this evidence did not

materially affect the verdict in this case and therefore the district court did not err in admitting the sheets of paper into evidence.

2. Evidence of ownership of pit bull terrier dogs

Wheeler also appeals the Government's introduction of evidence that he owned vicious pit bull dogs that were used to protect his drug operations. At trial, there were several references to the dogs but Wheeler seems to challenge only the testimony by Genesee County Deputy David Krish concerning Wheeler's dogs. Krish testified that, while at Wheeler's home investigating a complaint, Wheeler told him that "he would send the Pit Bulls on the police." Wheeler's attorney objected and the Government argued that Wheeler's statement about the dogs showed "consciousness of guilt." Wheeler's attorney explained, "I object to the relevancy of whatever my client may have said about Pit Bulls." The district court overruled the objection and Krish testified further that police officers had trouble approaching Wheeler's residence because of the aggressiveness of the dogs. On cross-examination, Wheeler's attorney asked Krish if he knew of any incidents of the dogs biting someone. The court ended further questioning on the subject stating, "I think I covered [whether Krish knows if the dogs bit anyone] just to move along, Mr. Steingold. . . . He says they were threatening appearing dogs."

Later in the trial Wesley Reade Haley, a key government witness, was asked about Wheeler's pit bulls and testified that Wheeler was interested in pit bulls and that he kept them for dog fighting, and not for attacking people. Wheeler's attorney objected to the relevancy of this

testimony and the district court struck the testimony as irrelevant and instructed the jurors to disregard it. Wheeler argues that if Haley's testimony regarding the dogs was struck from the record, then Krish's testimony regarding the dogs similarly should have been struck.

As discussed, there was extensive testimony during the trial regarding Wheeler's ownership of pit bulls. In addition to the testimony discussed above, an ATF agent was allowed by the court to rebut testimony that the dogs were not vicious. Tiara Rae Tatro, who was Wheeler's girlfriend, a co-conspirator, and a Government witness, testified about the dogs' demeanor and why she believed that the Defendant was keeping the dogs.

The district court did not err in allowing the Government to introduce evidence of Wheeler's ownership of pit bulls. The Government sought to introduce the dogs as evidence of Wheeler's involvement in a drug conspiracy, analogous to a firearm, and not as evidence of other crimes, wrongs, or acts under FRE 404(b). *United States v. Ware,* 161 F.3d 414, 418 (6th Cir. 1998) ("The evidence seized [including a firearm] pursuant to the search warrant was not evidence of other crimes or wrongs, but of involvement in the cocaine conspiracy at issue. Therefore, Rule 404(b) was simply not applicable."). Moreover, under FRE 404(b) the Government may be able to admit the evidence to prove a plan or as "tools of the trade." *See* FED.R.EVID. 404(b); *Ware,* F.3d at 417-18. The Government sought to use the evidence of Defendant's ownership of the dogs as evidence that he possessed "tools" of the drug trade and the admittance of such evidence is within the sound discretion of the district court. Therefore, the district court did not err in allowing Krish to testify about the dogs he encountered at Wheeler's residence.

B. Motion for Acquittal

Wheeler argues that the district court erred in denying his Federal Rule of Criminal Procedure 29 motion for judgment of acquittal on Count One, conspiracy to distribute marijuana. He argues that, though the Government is able to prove that Wheeler sold marijuana, the Government did not present sufficient evidence to prove the existence of a conspiracy. Wheeler made a Rule 29 motion on all counts after the Government rested and renewed the motion at the close of all evidence. The court denied the motion as to Counts Two, Three, Six, Seven and Eight because the court concluded that Wheeler had abandoned the motion as to those counts. The court denied the motion as to Count Five and reserved decision on the motion regarding Count One. After the jury verdict, the court denied the motion as to Count One.

A defendant asserting a claim of insufficiency of the evidence has a heavy burden. *United States v. Branham,* 97 F.3d 835, 853 (6th Cir. 1996). We review a claim of insufficient evidence by assessing "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Evans,* 883 F.2d 496, 501 (6th Cir. 1989) (emphasis in the original) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979))

To prove a conspiracy under 21 U.S.C. § 846, "the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join and participated in the conspiracy." *United States v. Pearce,* 912 F.2d 159, 161 (6th Cir. 1990) (quoting *United States v. Stanley,* 765 F.2d 1224, 1237 (5th

Cir. 1985)). We have held that "the government need not prove a formal agreement to establish the existence of a conspiracy to violate federal law and that a tacit or mutual understanding among the parties will suffice." *United States v. Ellzey,* 874 F.2d 324, 328 (6th Cir. 1989). "Moreover, '[a] conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan.'" *Id.* (quoting *United States v. Bavers,* 787 F.2d 1022, 1026 (6th Cir. 1985)).

Defendant is correct in asserting that the jury acquitted him of conspiracy to distribute cocaine. However, the Government presented extensive evidence, including testimony from Haley, Tatro, and Marcus Funches that there was an agreement to distribute marijuana between Wheeler and these witnesses. Each one of these witnesses, and Wheeler, had knowledge of the drug operation and the various parties that were participating in it. The evidence also shows that the involvement of the participants in the operation was knowing and intentional.

In his Reply Brief, the Defendant raised the argument for the first time that the Government was unable to prove that he was a member of the particular conspiracy charged in Count One of the indictment. He argues, instead, that he was a part of some other drug conspiracy. The Defendant argues that because he was acquitted of conspiracy to distribute cocaine, he should have also been acquitted of conspiracy to distribute marijuana because the indictment charged him with conspiracy to distribute both substances.

At oral argument, the Defendant raised the argument for the first time that the Government was unable to prove either he conspired to distribute marijuana between 1994 and 2000 or that he conspired to distribute at least 100

kilograms of marijuana. Defendant argues that, based on the testimony of witnesses and the evidence seized, the Government is unable to prove that he conspired to distribute over 100 kilograms of marijuana. He argues that, at most, the Government was able to show from the testimony of Funches and the various evidence seized that he distributed only 494 grams of marijuana. Because of the insufficiency of the evidence to prove that he distributed 100 kilograms of marijuana, Defendant argues that either (1) he should have be sentenced under 21 U.S.C. § 841(b)(1)(D) to zero to five years for distributing less than fifty kilograms of marijuana instead of under 21 U.S.C. § 841(b)(1)(B) to five to forty years for distributing 100 kilograms or more of marijuana; or (2) he should be acquitted of Count One. Defendant also raised the argument for the first time during oral argument that because the indictment charged him with distributing 1000 kilograms of marijuana and the Government did not prove that he distributed that amount, he should be acquitted.

Because the propriety of raising arguments for the first time in a reply brief or at oral arguments is highly suspect, we only briefly discuss the merits of Defendant's new claims. As we held in *United States v. Dale,* 178 F.3d 429, 431 (6th Cir. 1999): "It has been clear since *Braverman v. United States,* 317 U.S. 49, 54, 63 S. Ct. 99, 87 L. Ed. 23 (1942), that the allegation, in a single count of conspiracy, of an agreement to commit several crimes is not duplicitous, as conspiracy is itself the crime." In *Dale,* the defendant was found guilty by a jury of a single conspiracy to distribute both crack cocaine and marijuana, as charged in the indictment. We remanded the case because we found that the district court had committed

plain error by sentencing Dale using the statutory maximum sentence for crack rather than for marijuana. *Id.* at 434. However, the critical difference between *Dale* and the case at bar is that here the Government used a special verdict form whereas in *Dale* the jury only returned a general verdict form. *Id.* at 433. In this case, the jury returned a special verdict form finding the Defendant guilty of conspiracy to distribute between 100 and 1,000 kilograms of marijuana. We decline to indulge Defendant in his mathematical diversion of calculating the amount of marijuana he believes the jury should have convicted him of possessing given the testimony of Funches and the amount seized during various searches. The jury found that he had conspired to distribute between 100 and 1,000 kilograms of marijuana within a given range and that verdict will stand. Furthermore, Defendant's argument that because the Government failed to prove that he distributed 1,000 kilograms of marijuana he should be acquitted, is without merit. There is no authority to support the proposition that the Government's failure to prove the amount charged in the indictment should result in acquittal. If the Government charged the Defendant in good faith with distributing 1,000 kilograms of marijuana, then it is the jury's decision as to how much marijuana actually was distributed. The jury determined that Defendant had conspired to distribute between 100 and 1,000 kilograms of marijuana and therefore he is guilty as charged.

We conclude that all the necessary elements to finding a conspiracy to distribute marijuana are met. Therefore, in viewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of a conspiracy beyond a

reasonable doubt. Accordingly, Defendant has not met his heavy burden of showing that no rational trier of fact could have found him guilty of forming an agreement to distribute marijuana.

C. Sentencing Enhancements

The district court granted Wheeler leave to file a pro se supplemental brief challenging three sentencing enhancements.

1. Organizer or leader

In the PSI, the Government proposed an enhancement for a leadership role. United States Sentencing Guidelines § 3B1.1(a) provides:

> Based on the defendant's role in the offense, increase the offense level as follows:
>
> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

The guidelines define a "participant" as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 cmt. n.1 (2000). The five individuals identified by the Government as involved in the drug conspiracy were Tatro, Funches, Haley, Chad Lamson, and Brian James. At the sentencing hearing. Wheeler argued that there was not a preponderance of evidence to support the conclusion that five or more participants were involved in Wheeler's criminal activity. Specifically, Wheeler argued that Lamson and James were

merely regular customers and not participants in the drug conspiracy, and that Haley denied involvement in the drug conspiracy. Wheeler argues that, at most, he should have been subject to a two-level enhancement under USSG § 3B1.1(c) ("If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.").

The district court, after hearing testimony, concluded that "there is sufficient evidence to indicate that – that the defendant was an organizer or a leader that involved five or more participants including himself."

An enhancement under § 3B1.1(a) is subject to review for clear error. *United States v. Ward,* 68 F.3d 146, 151 (6th Cir. 1995); *see also* 18 U.S.C. § 3742 ("The court of appeals shall . . . accept the findings of fact unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts."). The district court's findings of fact must be based on a preponderance of the evidence. *Ward,* 68 F.3d at 151 (citation omitted).

Lamson testified at trial that Wheeler supplied him with marijuana and cocaine:

Q But you also in turn were selling it?

A Yeah.

Q Was [Wheeler] a reliable supplier for you while you were selling it of [sic] cocaine and marijuana?

A Yes.

Q Could you depend on him having the stuff?

A Yes.

Lamson also testified at trial that he purchased cocaine and marijuana from Wheeler several times, and that he was at Wheeler's residence nearly every day for two years. Lamson's father testified that "[Wheeler] was turning my son into one of his little cronies," and he "told [his son] that he wasn't allowed to – hang around with Audie anymore." Lamson's father subsequently moved him to another town in order to stop him from associating with Wheeler. Accordingly, it was not clearly erroneous for the district court to conclude that Lamson was a participant in Wheeler's drug activity, and not merely one of Wheeler's customers. *See also* discussion *infra,* Part II, C, 2, *Use of a minor.*

Defendant also claims that James was merely a customer. At the sentencing hearing the Government did not argue otherwise, but merely stated that "even if you wanted to give counsel his argument that James should not be included, there's still five people that are named." Therefore, we can assume that the district court disregarded James as a participant in Wheeler's drug conspiracy. However, even if it was found that the James was merely a customer, the enhancement is still supported by a preponderance of the evidence because Wheeler, Tatro, Funches, Haley, and Lamson would constitute five participants under the guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 cmt. n.1 (2000).

Wheeler also argued at the sentencing hearing that Haley never admitted involvement in Wheeler's drug trafficking and the Government never proved his involvement. In his testimony, Haley never directly admits to being involved in Wheeler's drug conspiracy. However, the Government did elicit testimony from Haley regarding his plea agreement in which the Government would ask for a

sentencing reduction for his charges if he testified against Wheeler. Furthermore, Haley was a co-defendant in this case and pleaded guilty to Count Six of the Fifth Superseding Indictment, Felon in Possession of a Firearm. Haley testified that he lived with Wheeler and a friend of Wheeler's at at least three residences where Wheeler conducted his drug operations. Chad Lamson testified to Haley's role in the operation as: "The brut [sic] squad. If [Wheeler] needed someone to fight him, he'd tell [Haley] to go fight them." Thomas Lamson testified that "[Haley] took over Marcus' spot after Marcus was locked up. . . . [H]e became like Audie's right hand man. . . . Audie didn't ever go anywhere without him."

Both the jury and the district court accepted the Government's argument that Haley was acting as Wheeler's bodyguard in his drug operations and that he was not only Wheeler's customer but an integral part of Wheeler's drug operation. Given the evidence presented and the district court's determination of the credibility of the witnesses, it was not clearly erroneous for the district court to conclude that Haley was a participant in Wheeler's drug operation. Accordingly, Wheeler's challenge to the § 3B1.1(a) enhancement is without merit and the district court's decision was not clearly erroneous.

2. Use of a minor

Wheeler also received a sentencing enhancement for the use of a minor under § 3B1.4. That section provides in relevant part:

> If the defendant used or attempted to use a person less than eighteen years of age to commit the

> offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.

U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2000). Application Note one of § 3B1.4 reads:

> 1. "Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting

Wheeler argues that Lamson, though a minor at the time Wheeler committed the conspiracy to distribute marijuana offense, was merely a customer and not being "used" by Wheeler in his drug activities. After hearing testimony on the issue, the district court concluded that "the evidence in the case, the testimony at trial adequately supports the Government's claim that Mr. Wheeler did indeed use a minor to commit a crime and therefore the two level enhancement is appropriate."

We review a district court's application of the Guidelines *de novo,* however, the district court's findings of fact are reviewed for clear error. *United States v. Dupree,* 323 F.3d 480, 484 (6th Cir. 2003); *United States v. Cowan,* 196 F.3d 646, 647-48 (6th Cir. 1999).

In *United States v. Butler,* 207 F.3d 839, 849 (6th Cir. 2000), we held that an enhancement under § 3B1.4 "requires a showing of more than a mere criminal partnership." In reversing the defendant's sentence enhancement in *Butler,* we held that the Government was required to show that the defendant actively and intentionally used a minor in the commission of the offense. *Id.* at 848. ("Congress' inclusion of these considerations indicates that to deserve § 3B1.4 enhancement, one must do more than simply participate in crime with a minor.").

As the discussion above demonstrates, Lamson was not merely Wheeler's customer. *See* discussion *supra,* Part II, C, 1, *Organizer or Leader.* Wheeler supplied drugs to Lamson for him to distribute and Lamson testified that he had constant contact with Wheeler, even running away from his home to live with Wheeler for a few weeks. Lamson's father testified that Chad was involved in Wheeler's drug business, though Chad himself denies any direct involvement. The district court rejected Wheeler's argument that he did not know that Lamson was selling the drugs he purchased from Wheeler. Instead, the district court found that by supplying drugs to Lamson, he was "using" him in his conspiracy to distribute drugs and this fit the definition of "used" under USSG § 3B1.4. This finding was not clearly erroneous.

Furthermore, testimony at trial showed that Lamson was with Wheeler almost every day and very knowledgeable about Wheeler's drug business. Undoubtedly, Wheeler trained Lamson about the drug business and encouraged Lamson's use and distribution of drugs. With these affirmative actions, Wheeler's interaction with Lamson fits the definition of "use" as defined in the Guidelines. *See Butler,* 207 F.3d at 847. ("A consideration of the definitions of 'use' supports the notion that § 3B1.4 would require more affirmative action on the part of a defendant."). Lamson also testified that Wheeler threatened to harm him if he talked with the authorities about Wheeler's drug operation. Under the Guidelines, this threat would constitute the "use" of a minor by threats to avoid detection of the offense. U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 cmt. n.1. Accordingly, the district court did not err in finding that the circumstantial evidence indicated that

Lamson was more than just a customer and the two-level enhancement was not clearly erroneous.

3. Obstruction of justice

Finally, Wheeler appeals his two-level enhancement for obstruction of justice under USSG § 3C1.1. The probation officer recommended the enhancement because he claimed that Wheeler, among other things, threatened Haley on September 13, 2000 while both Wheeler and Haley were at the Genesee county jail. Wheeler argues that he did not threaten Haley, and that it was actually Haley who threatened him.

Section 3C1.1 reads in relevant part:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2000). Application Note four of § 3C1.1 reads:

> The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:
>
> (a) threatening, intimidating, or otherwise unlawfully influencing a codefendant, witness, or juror, directly or indirectly, or attempting to do so. . . .

On May 24, 2001, the district court held an evidentiary hearing on the Government's request for an enhancement under § 3C1.1. At the hearing, five individuals testified: (1) Haley; (2) Wheeler; (3) Matthew Rule, a deputy at the Genesee County Sheriff's Department; (4) Tamika Taylor, a deputy at the Genesee County Sheriff's Department; and (5) James Fulger, a deputy U.S. Marshal in Flint, Michigan. The Government also admitted two pieces of evidence: (1) a report made by Rule describing the September 13, 2000 incident at the jail where Wheeler threatened Haley; and (2) a report from the U.S. Marshal Service in which Fulger overheard Wheeler threatening Haley at the jail on September 13, 2000. In overruling Wheeler's objection to the enhancement, the district court concluded:

> [T]he Court first of all has to weigh the situation insofar as credibility is concerned. There are two things that really weigh rather heavily against Mr. Wheeler on the issue of credibility. First of all, of course, is his record of criminal behavior, criminal involvement over the years . . . In addition to that . . . Mr. Wheeler certainly has a vitally important interest. . . . Mr. Wheeler says yeah, that – that he described Mr. – in a loud voice he described Mr. Haley as a snitch in a stream of profane commentary about Mr. Haley.
>
> . . .
>
> But Mr. Haley sure enough is a snitch, no about it, he testified. And Mr. Wheeler let everybody know that he was a snitch. Now they can believe what they want about – about whether Mr. Wheeler has ever been a snitch, but they're going to know that Mr. Haley is because he's going to give testimony in the case.

> And therefore it seems to me that Mr. Wheeler when he lets everybody know loudly and profanely in that jail what Mr. Haley is . . . he's certainly putting Mr. Haley in what he himself described as a situation where Mr. Haley may get hurt.
>
> Now that seems to me that's intimidation. On balance, I would think – it's the Court's impression here that the Government on that matter, that is the matter of whether Mr. Haley was threatened, whether there was an attempt to intimidate him and therefore obstruct justice, whether that occurred in this case, the preponderance of the evidence convinces the Court that that is with the position of the – of the Government on this particular point.

In *United States v. Jackson-Randolph,* 282 F.3d 369, 389 (6th Cir. 2002), we settled a long-standing debate in this Circuit regarding the standard of review for enhancements under § 3C1.1. Relying on the Supreme Court's decision in *Buford v. United States,* 532 U.S. 59 (2001), we "change[d] our prior analyses of the appropriate standard of review of the § 3C1.1 enhancement." *Jackson-Randolph,* 282 F.3d at 389. We concluded that "the clear error standard is also appropriate for reviewing sentencing decisions under § 3C1.1 where the sole issue before the district court is a fact-bound application of the guideline provisions." *Id.* at 390.

In applying this deferential standard of review to the credibility determinations and the factual findings of the sentencing court, we affirm the enhancement for obstruction of justice. The district court found Wheeler's version of events unpersuasive and concluded that Wheeler made the threats as testified to by Haley, Rule, Fulger, and

Taylor. The district court conducted a hearing, heard witness testimony, and reviewed the reports that were admitted, and we do not find that the district court's determinations were clearly erroneous.

D. Ineffective Assistance of Counsel

Finally, Defendant argues that "[w]hile retained Counsel worked hard, no doubt, before and during the trial proceedings, Defendant's case clearly lost momentum once the jury rendered its verdict." Defendant argues that his trial counsel was ineffective because he did not file a renewed motion for judgment of acquittal on all counts within seven days of the verdict, pursuant to Federal Rule of Criminal Procedure 29. Though counsel did file such a motion at the close of the Government's case, counsel chose not to renew the motion after the verdict was rendered. Defendant argues that had the renewed motion been successful, his base offense level would have been significantly lower and consequently his sentence would have been lower. In his reply brief, Defendant also argues for the first time that a renewed Rule 29 motion would have been successful because the Government was unable to present sufficient evidence that the Defendant was a part of the conspiracy charged in the indictment, and that the Defendant conspired to distribute more than 100 kilograms of marijuana.

Again, we question the propriety of raising arguments for the first time in a reply brief. However, we generally do not address on direct appeal claims of ineffective assistance of counsel unless the record has been sufficiently developed to provide meaningful factual review. *See, e.g., United States v. Brown,* 276 F.3d 211, 217 (6th Cir. 2002).

In this case, we have no evidence to evaluate counsel's decision not to file a renewed motion for acquittal. We only have an Order sanctioning Wheeler's trial attorney for recklessly filing a motion for a new trial. The attorney filed the motion asserting that the jury foreperson:

> had improper communications with persons outside the jury regarding the case while it was being tried, had improper communications with other jurors in the case while the matter was being tried and failed to inform this Court of her familiarity with Defendant Audie Wheeler both before and during the trial of this case.

The court held a hearing on July 12, 2001, and in ordering sanctions against the attorney, the district court found that the attorney was reckless in filing the motion because he never investigated "the veracity of the representations on which the motion was based."

Other than this incident, we have no evidence on the record regarding the attorney's trial performance in general, and no specific evidence regarding the attorney's decision not to file a renewed motion for acquittal on all charges. Accordingly, we will defer review of these claims to a post-conviction proceeding in order to allow the record to be more fully developed. *See also United States v. Aguwa,* 123 F.3d 418, 423 (6th Cir. 1997) ("Our court has routinely concluded that such claims are best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255.").

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of conviction and sentence of the district court.

UNITED STATES DISTRICT COURT
Eastern District of Michigan

UNITED STATES OF AMERICA

v.

AUDIE DENVER WHEELER,
Defendant.

Case Number
CR00-50032-01-FL
Hon. Paul V. Gadola

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, AUDIE DENVER WHEELER, was represented by David S. Steingold

■ The defendant was found guilty on counts One through Three, Five, Seven, and Eight of the Fifth Superseding Indictment after a plea of not guilty.

■ The defendant has been found not guilty on count Six of the Fifth Superseding Indictment.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 846 and 841(a)(1)	Conspiracy to Distribute Controlled Substances	01/04/00	One
21 U.S.C. 841(a)(1) and 18 U.S.C. 2	Possession with Intent to Distribute Marijuana; Aiding and Abetting	10/01/98	Two

18 U.S.C. 922(g); 18 U.S.C. 2	Felon in Possession of Firearms; Aiding and Abetting	10/01/98	Three
18 U.S.C. 922(g)	Felon in Possession of Firearm; Felon in Possession of Ammunition	10/8/99; 4/28/00; 5/25/00	Five, Seven, and Eight

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed: 5/29/01

May 24, 2001
Date of Imposition of Judgment

/s/ Paul V. Gadola
Paul V. Gadola
United States District Judge

Defendant's SSN: 379-70-3034
Defendant's Date of Birth: 07/25/72
Defendant's USM No.: 26850-039
Defendant's Residence Address: 3201 E. Pierson Road; Flint, MI 48506

IMPRISONMENT

On Count One: The defendant is hereby committed to the custody of the Untied States Bureau of Prisons to be imprisoned for a term of 365 months.

On Counts Two, Three, Five, Seven, and Eight: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Audie Denver Wheeler be sentenced to the custody of the Bureau of Prisons for a period of 120 months each count (All counts should be concurrent).

Due to the lengthy prison sentence, the imposition of a fine is waived and any costs of incarceration and supervision are waived.

■ The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

On Count One and Two: Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years concurrent. On Counts Three, Five, Seven, and Eight: Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years. All to run concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within *72 hours* of release from the custody of the Bureau of Prisons.

- The defendant shall not commit another federal, state or local crime.
- The defendant shall not illegally posses a controlled substance.

FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 13, 1994

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- The defendant shall not own or possess a firearm, destructive device, or dangerous weapon as defined in 18 U.S.C. § 921.

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay, as directed by the Probation Office, any such fine, assessments, costs, or restitution that remains unpaid at the commencement of the term

of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with any additional conditions as listed on the attached page entitled special conditions of supervision

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program approved by the Probation Department for substance abuse, which program may include testing to determine if the defendant has reverted to the use of drugs or alcohol.

2. The defendant shall not use or possess alcohol in any consumable form, nor shall the defendant be in the social company of any person who the defendant knows to be in possession of alcohol or illegal drugs or visibly affected by them. The defendant shall not be found at any place that serves alcohol for consumption on the premises, with the exception of restaurants.

3. The defendant shall be lawfully and gainfully employed on a full-time basis, or shall be seeking such lawful, gainful employment on a full-time basis. "Full-time" is defined as 40 hours per week. In the event that the defendant has part-time employment, he shall devote the balance of such 40 hours per week to his efforts of seeking additional employment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$600.00**	**$0.00**	**$0.00**
If applicable, restitution amount ordered pursuant to plea agreement			**$0.00**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties

PAYMENT OF TOTAL FINE AND OTHER CRIMINAL MONETARY PENALTIES SHALL BE DUE AS FOLLOWS:

■ IN FULL IMMEDIATELY.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

■ The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	36
Criminal History Category:	V
Imprisonment Range:	292 months to 365 months
Supervised Release Range:	4 to 5 years on Count 1 At least 4 years on Count 2 2 to 3 years on Counts 3, 5, 7, and 8
Fine Range:	$20,000.00 to $2,500,000.00

■ The fine is waived or is below the guideline range because of the defendant's inability to pay.

Total Amount of Restitution: $n/a

■ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Mr. Wheeler stands before the Court on six more felony convictions. The defendant has three prior felony convictions in State Court and is only 28 years of age. The defendant has been placed on parole and failed two terms of probation and has been sentenced to the state prison system on his third felony conviction. Upon his release from the prison system, the defendant continued to sell illegal substances at a regular rate which led up to his current convictions in Federal Court. On top of his illegal drug sales, the defendant also dealt in stolen weapons. It is more than obvious that each time the defendant was arrested there was some type of weapon involved. The majority of the weapons seized were stolen. At this time a sentence at the highest end of the sentencing guideline range is appropriate in order to protect the public and the defendant. Additionally, the defendant threatened and attempted to intimidate a government witness, thereby attempting to obstruct justice in this litigation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Appeal No. 01-1807

v.

AUDIE DENVER WHEELER,

Defendant-Appellant. /

MOTION FOR LEAVE TO FILE PETITION FOR PANEL REHEARING OUT OF TIME

Now comes Christopher J. McGrath, attorney for Defendant, Audie Wheeler, and hereby requests acceptance of Defendant's Petition for Panel Rehearing out of time. In support of this motion, counsel states:

1. The Petition for Panel Rehearing was due on Thursday, June 12, 2003.

2. Under the mistaken belief that FRAP 25(a)(2)(B)(i) regarding service of briefs and appendices applied to petitions for rehearing, I mailed Defendant's Petition for Panel Rehearing on June 12, 2003.

3. The Petition for Panel Rehearing was received by the Court on Monday, June 16, 2003.

4. On Monday, June 18, 2003, the Court contacted me via telephone and indicated that petitions are not governed by the rule addressing the filing of briefs and appendices.

For these reasons, counsel requests that the Court accept Defendant's Petition for Panel Rehearing four days out of time.

Dated: June 19, 2003

Respectfully submitted,

/s/ Christopher J. McGrath
Christopher J. McGrath
Attorney for Audie
Denver Wheeler
42705 Grand River,
Suite 201
Novi, Michigan 48375-1727
(248) 374-1822/
Fax: (248) 374-1825

CERTIFICATE OF SERVICE

It is hereby certified that service of the attached Motion for Leave to File Petition for Panel Rehearing Out of Time has been made this day by placing the Motion in a postage prepaid envelope and depositing the envelope in the United States mail addressed to:

Mark C. Jones
Assistant United States Attorney
210 Federal Building; 600 Church Street
Flint, Michigan 48502-1280

Dated: June 19, 2003

/s/ Christopher J. McGrath
Christopher J. McGrath
Attorney for Audie
Denver Wheeler

Case No.: 01-1807

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Jun. 26, 2003)

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

AUDIE DENVER WHEELER

Defendant-Appellant

Upon consideration of the appellant's motion for leave to file a petition for rehearing out of time,

It is ordered that the motion is hereby **GRANTED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/[bc]
Leonard Green, Clerk

Case No.: 01-1807

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Jul. 30, 2003)

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

AUDIE DENVER WHEELER

Defendant-Appellant

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/[bc]
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

UNITED STATES OF AMERICA,

Plaintiff,

v

AUDIE DENVER WHEELER,

Defendant.

Case No. 00-50032
Honorable Paul V. Gadola
Flint, Michigan
October 11, 2000
8:35 a.m.

Ordered By: SPIROS COCOVES, ESQ.

JURY TRIAL
VOLUME 3

APPEARANCES:

For the Plaintiff: MARK JONES, ESQ. (P33325)
210 Federal Building
600 Church Street
Flint, MI 48502

For the Defendants: DAVID STEINGOLD, ESQ. (P29752)
2100 Penobscot Building
Detroit, MI 48226

Court Recorder: Julia Delling

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

* * *

[62] officer.

I guess what I'm suggesting the foundation has not been laid –

THE COURT: If he acquired or confiscated the items, certainly he could testify to that. Or if he was present when they were confiscated by another officer then he could testify to that.

MR. STEINGOLD: Exactly, thank you.

Q Were you involved in the seizure of these items?

A Yes.

Q Did we go through this prior to trial in terms of preparing as to who seized what?

A Yes.

Q All right. And are these items that you seized, Officer Ellis?

A Yes, they are.

MR. JONES: Your Honor, I move that Nos. 33 through 37 be admitted.

THE COURT: Any objection?

MR. STEINGOLD: None, Your Honor.

THE COURT: All right. Government Exhibit Nos. 33, 34, 35, 36, and 37 are received in evidence.

(Government's Exhibit Nos. 33-37 were admitted)

Q Okay. Turning your attention to No. 33 and No. 37, you indicated that the form of writing on there was familiar to [63] you. How is that, Officer Ellis?

A Based on my experience as a police officer this appears to be gang, what is called – commonly known as gang graffiti.

Q Okay. And why do you say that?

A By the – the symbols which are present on the paper.

Q All right. And are you familiar with gang – are you familiar with gangs in the Flint area?

A Somewhat, yes.

Q All right. Has that become an issue in terms of some of your investigations of narcotics activities as to what gangs are doing?

A Yes.

Q Okay. Is there a specific reference to a group on No. 37?

A Yes, there is.

Q Okay. And what is listed on there?

A It says Spanish Cobra killa.

Q And the last word you said was what?

A Killa.

Q Okay. Is that slang for something?

A Yes.

Q Being what?

A Killer.

Q All right. And what are Spanish Cobras?

A It is a gang, street gang which congregates mainly on the [64] east side of Flint.

Q You've mentioned that there were some photographs with which you were familiar, is that correct?

A Yes.

Q Okay. Or at least you're familiar with the persons depicted in them, is that right?

A Yes.

Q All right. No. 34, let's get more specific on that. Where was that seized from?

A The northwest bedroom of 426 East Parkway.

Q All right. I'm going to have you come to the easel back here.

MR. STEINGOLD: Your Honor, may we approach?

THE COURT: Pardon me?

MR. STEINGOLD: May we approach?

THE COURT: All right. Excuse us, ladies and gentlemen.

(At Side Bar)

MR. STEINGOLD: Your Honor –

THE COURT: The record will indicate this conference is being conducted outside the presence of the jurors.

MR. STEINGOLD: Your Honor, I did not object when the question was first asked so as not to draw particular highlight to the fact that Mr. Jones is now bringing in what I consider to be 404(b) material. I have

never been given [65] notice of any intention to introduce 404(b) material.

It seems to me, Your Honor, if they're going to try and claim that this is some gang related activity, something that is not in the indictment, something that is not even alleged in the indictment, something that is not an element of any of the offenses charged in the indictment. This is something that I probably should have been given notice of and it is not something that should be brought in at this point to an attempt to prejudice the jury against my client by insinuating without any direct connection that my client is somehow involved in gangs.

THE COURT: Mr. Jones.

MR. JONES: Well, if counsel was going to object he should have done so already, first of all. Secondly, at least one witness has indicated to me that he was involved in gang activity.

MR. STEINGOLD: Charge him. Charge him, allege it and prove it. If you don't, you can't just start bringing it in because you want to. They don't even have so much as a handwriting expert to show that this is my client's writing, even if that made it relevant. And certainly I do not think –

THE COURT: Well, who – who are these so-called subjects in the photographs?

MR. JONES: The persons depicted include Mr. Wheeler [66] and then there's Chad Lamson is in there. I didn't look at –

THE COURT: Is there evidence that they were somehow involved in the alleged conspiracy here?

MR. JONES: Well, Wheeler obviously is alleged to be involved in the conspiracy.

THE COURT: Well, I understand that.

THE COURT: Chad Lamson was the person who was stopped leaving one of the alleged drug houses which – for which a warrant was subsequently acquired. And I do intend to offer testimony relative to that.

The police stopped him I think it was September 30th, 1998. I don't have my notes in front of me. He was stopped with his mother, Tracy Lamson. There were drugs inside of the house. The officers – but that's already part of this record.

THE COURT: It would seem to me that that would have relevance involving the charge here.

MR. STEINGOLD: I don't have a problem with the picture. My problem is, he's bringing what he is now trying to establish through pseudo expert testimony is gang related material, bringing out the name of the group with as scary a name as the Spanish Killers, I think that's what he said.

THE COURT: Spanish Cobras.

MR. STEINGOLD: Cobras, I'm sorry. But that –

THE COURT: It's well known here in Flint.

[67] MR. STEINGOLD: Well, I'm glad that I'm not as familiar with that group as apparently the Court is. But the point is that there's no allegation that this is a gang matter.

My client is not charged with any gang and if they're going to start bringing in gang, if it isn't for prejudicial purposes, Your Honor, of what relevance is that testimony?

MR. JONES: Well, Your Honor, my suggestion on this point is, it's already in and counsel can renew his objection to the evidence at the end of the case if I don't tie it in adequately and request a special instruction to disregard it.

I mean the fact is it's done already. What am I supposed to do?

MR. STEINGOLD: Well, Your Honor –

THE COURT: Yeah, the photographs are in evidence at this point.

MR. STEINGOLD: I understand that. And – and frankly like I said, while I was not happy about it at the time, I certainly wasn't going to jump up and start screaming about something and let the jury think that it's more than it is.

THE COURT: Well, I think that's –

MR. STEINGOLD: And if that's where it stops, that's one thing, but if Mr. Jones intends to persist in bringing out evidence that my client was somehow involved in a gang, then I [68] think that some relevance has to be shown and some reason has to be given as to why we have not been given prior notice.

THE COURT: Well, I would agree with that. But insofar as – I think Mr. Jones' suggestion is a valid one. That if he can link these exhibits up with some activity

that's alleged to be part of the conspiracy here, then that's one thing.

And if it turns out that it has no bearing and none of these photographs have any relevance in establishing any of that, then – then perhaps you'd be entitled to a limiting instruction. But at this point at least the photographs are in evidence. It seems to me we're just spinning our wheels over here at the side bar.

MR. STEINGOLD: I think that the focus of my objection is to alleviate any further reference to gangs.

THE COURT: Well, what about that, Mr. Jones?

MR. JONES: I guess I'm going to have to think about how to respond to that, Your Honor. I'd like – I'd like to add and I am showing these exhibits religiously to counsel before I am making a record of them in front of the jury.

And counsel is trying to suggest that I'm sneaking this up on him. I did show him –

MR. STEINGOLD: No. I'm not suggesting that at all.

THE COURT: They're in evidence. Let's break this up now. They are in evidence and there's no reason to conduct [69] – to continue with this matter here.

If there's further matters that come up about an alleged association with a gang, then you can make the objection at the point that comes up, but these matters are in evidence.

MR. STEINGOLD: Yeah, it is. My objection is to the continuing testimony on that subject. Thank you.

(End of Discussion at Side Bar)

THE COURT: Proceed.

MR. JONES: Yes.

Q Officer Ellis, No. 34, do you know who is depicted in that?

A I know two of the subjects.

Q Okay. Can you speak up a little bit, please?

A I know two of the subjects, I'm sorry.

Q Okay. And those being whom?

A The one in the middle would be Audie Wheeler and the one on the left appears to be a subject identified as Chad Lamson.

Q All right. That's L-a-m-s-o-n?

A Yes.

Q All right. There is some writing at the bottom on this, is that correct?

A Yes.

Q All right. Now is that writing that was already on this photograph?

A The writing on the bottom, yes.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

UNITED STATES OF AMERICA,	Case No. 00-50032
Plaintiff,	Honorable Paul V. Gadola
v	Flint, Michigan
	October 26, 2000
AUDIE DENVER WHEELER,	8:55 a.m.
Defendant. /	

Ordered By: SPIROS COCOVES, ESQ.

JURY TRIAL
VOLUME 14

APPEARANCES:

For the Plaintiff: MARK JONES, ESQ.
(P33325)
210 Federal Building
600 Church Street
Flint, MI 48502

For the Defendants: DAVID STEINGOLD, ESQ.
(P29752)
2100 Penobscot Building
Detroit, MI 48226

Court Recorder: Julie Delling

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

* * *

[41] (Jury Out; Time Not Available)

THE CLERK: You may be seated.

THE COURT: Just a few moments here.

(Off the Record Discussion)

THE COURT: There's one count under advisement on the motion as I recall. I'm just trying to make sure that I'm specifying the correct count here. It's my understanding that it was Count 5 that I – was it not or – no, it wasn't – pardon me? Go ahead, Mr. Steingold.

MR. STEINGOLD: It was Count 1.

THE COURT: Count 1, yes, you're right, it was the conspiracy count that I had under advisement. I ruled on Count 5 and then there were a number of counts where you didn't pursue the motion.

But on Count 5, that is the conspiracy count, I had that one under advisement with the defense having made a motion for judgment of acquittal. And that's a motion that it must be granted when the evidence viewed in the light most favorable to the Government such that reasonable jurors must have reasonable doubts as to the existence of any essential element of the crime charged.

I'm not to weigh the evidence, I'm not to assess the credibility of the witnesses, but I'm to submit the case to the jury and the evidence and inferences therefrom most favorable to the Government would warrant a jury finding that [42] the defendant was guilty beyond a reasonable doubt.

In this matter I ruled on the motion for judgment of acquittal on the other counts. I kept the conspiracy count

under advisement, I allowed it to go to the jury and it's my finding that there was – that the evidence was sufficient for me to have submitted that count to the jury. And the jury has made its finding on that count.

I do find that there was sufficient evidence to go to the jury under which the – a reasonable jury could fairly base a finding of guilt of the offense of conspiracy to distribute controlled substances. The jury has found that there was here a conspiracy to distribute marijuana.

MR. STEINGOLD: Your Honor, if I may, I was hoping the Court would give me an opportunity before it rules, and I understand the Court's ruling.

My argument for the Rule 29 on Count 1, is that there was no showing of any conspiracy between '94 and '97. And we went back and forth about the incident in '95, the only event alleged before '97. And of course Mr. Jones' position was that apparently Mr. Lamson's presence in advising Mr. Wheeler that the police were around was perhaps enough of a conspiracy – enough to support the conspiracy theory.

But the event in 1995 dealt solely with cocaine. There was absolutely positively no one witness who testified to my client engaging in the sale of marijuana until at the earliest [43] 1997.

And the jury has found that the conspiracy was on marijuana. I don't know how they found that, obviously I haven't had a chance to talk to the jury, but the reason that I believe that the motion on the Rule 29 motion should be granted, is that assuming that it is a marijuana conspiracy, it could not possibly have begun before 1997.

There was no testimony elicited of my client selling marijuana in any form to anyone prior to that date.

THE COURT: Mr. Jones?

MR. JONES: Your Honor, actually I think the verdict weakens counsel's position because they only found a conspiracy to distribute the marijuana. There is no – there is no support for counsel's theory that this '95 cocaine incident should give him more momentum.

I don't see – it doesn't make sense to me because there's plenty of evidence showing from – at least from '97 forward as to a conspiracy to distribute the marijuana. I don't see how this strengthens his position.

THE COURT: Doesn't it follow, Mr. Steingold, that the jury couldn't have been prejudiced by the evidence regarding the – I think it was a 1995 incident because they didn't – they didn't convict on the – on the cocaine charge, they convicted on the marijuana charge.

MR. STEINGOLD: Well, I agree, Your Honor. What I'm [44] saying is that if the marijuana conspiracy could not have begun prior to 1997 then the Rule 29 should be granted on Count 1 because Count 1 says that it started in 1994. And 1994 is – 1997 was a three year divergence.

THE COURT: So your argument really is that the date is – is so far removed from the evidence in the conspiracy that the – that the – that the – that the count should have been dismissed on your motion, right?

MR. STEINGOLD: Yes, Your Honor.

THE COURT: It's not – I think you made your claim during the trial also that the – that the evidence of

the 1995 incident shouldn't come in. And of course – and of course I think I let it in, but certainly that didn't prejudice Mr. Wheeler because they didn't find him guilty, the conduct that was involved in the 1995 incident.

But your argument is that the date on the – the date of the indictment is too far removed from the – from the evidence in the case on the marijuana conspiracy, right?

MR. STEINGOLD: Yes. Judging the evidence in a light –

THE COURT: You want to comment on that, Mr. Jones?

MR. JONES: Well, Your Honor, the original allegation was conspiracy to distribute controlled substances, both cocaine and marijuana. And there was at least a good faith basis for alleging '94 through 2000.

[45] I acknowledge that really the meat and potatoes started in '95 and thereafter. But it doesn't seem fatally flawed under circumstances where they found just the conspiracy to distribute marijuana, I can't see possibly how – either how he's prejudiced or why a Rule 29 motion should be granted.

There is plenty of evidence all over this record of the fact there was a conspiracy to distribute marijuana. Indeed the defense witnesses I thought fortified the Government's theory on the marijuana in particular.

THE COURT: Mr. Steingold, I – I am going to stand by what I just said. I'm denying your motion for a judgment of acquittal on Count 5. I've already denied it on the – on the other – Count 1, pardon me. I keep misspeaking myself.

I keep mentioning five, I don't know why that sticks in my mind so heavily, but it's Count 1 that I'm talking about. It just seems to me that yes, there was evidence in my estimation of a – sufficient to go to the jury on a conspiracy to distribute controlled substance both cocaine and marijuana.

The jury made a determination that – that marijuana was involved but not cocaine. But I felt there was – I really feel that there was sufficient evidence to go to the jury on both basis, that is on the basis of both controlled substances, both cocaine and marijuana.

And that would take it back approximately to the date [46] stated in the indictment. The jury found for your client on the – on the cocaine portion of the alleged conspiracy and they found against him on the marijuana portion of the alleged conspiracy.

So it seems to me that the – that the verdict is appropriate and it should stand under those circumstances. Now if you want to submit more authority in – in the form of a motion for a new trial. Certainly you've got that right to do that.

But at least I am denying the motion for judgment of acquittal on Count 1 as I have previously denied the motion on the other counts. Including many – the counts that of course you didn't pursue, although you originally moved for judgment of acquittal on all the counts. But I believe some of those – the motion on some of those counts was abandoned during the trial.

MR. STEINGOLD: Thank you, Your Honor.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUDIE DENVER WHEELER,

Defendant.

CRIMINAL CASE
NO. 00-50032-01

HONORABLE
PAUL V. GADOLA
U.S. DISTRICT JUDGE

/

ORDER

On June 22, 2001, this Court ordered that Attorney David S. Steingold (P29752) appear on July 12, 2001 and show cause as to why he should not be sanctioned for recklessly or in bad faith filing a motion for a new trial. On July 12, 2001, a hearing was held on this matter before the Honorable Paul V. Gadola, and all parties were given an opportunity to appear and argue in support of or in opposition to the imposition of sanctions. For reasons set forth below, this Court imposes sanctions on Attorney Steingold for reckless conduct.

Factual and Procedural Background

On June 11, 2001, Attorney Steingold filed a Motion for a New Trial asserting the following:

> Juror Williams-Robinson, the fore-person of the jury that convicted Defendant Audie Wheeler, had improper communications with persons outside the jury regarding the case while it was being tried, had improper communications with other jurors in the case while the matter was

> being tried and failed to inform this Court of her familiarity with Defendant Audie Wheeler both before and during the trial of this case.

(Def. Mot. ¶ 4.) Attorney Steingold attached an affidavit from Krystal Butterfield who averred that, "Ms. Williams-Robinson was a juror in the Federal Court Trial of Audie Wheeler" (Butterfield Aff. ¶ 3), that "Ms. Terinna May [is] the daughter of Ms. Williams-Robinson" (*id.* ¶ 2), and that on several occasions during the course of the trial Ms. Williams-Robinson had conversations with Ms. May and other jurors about the substance of the court proceedings and the jury's projected verdict (*see id.* ¶¶ 4-11). The affidavit was signed by Butterfield on May 25, 2001 and was notarized by Attorney and Notary Public Tracie D. Palmer (P53555) in the "State of Michigan," "County of Wayne" as follows: "On this 25th day of May, 2001, before me personally appeared Krystal Butterfield to me known to be the person(s) described herein, and who executed the foregoing instrument, and she acknowledged that she voluntarily executed the same." (*Id.* at 2.) Attorney Steingold stated that other witnesses would attest at a hearing to facts similar or identical to those presented by Butterfield. (*See* Def. Mot. ¶ 6.)

In response, the Government attached a copy of the peremptory challenge sheet showing that Attorney Steingold, in his own-handwriting, exercised a peremptory challenge and dismissed Ms. Williams-Robinson before the jury was impanelled. (*See* Gov't Attach. 3.) The Government also attached the "Jury Sign In Sheet" showing that Ms. Williams-Robinson was not among the jurors in this case (*see* Gov't Attach. 4), and a copy of the Verdict Form showing that the jury fore-person was Kevin M. Berryman (*see* Gov't Attach. 1). Thus, Attorney Steingold should have

been well aware that Ms. Williams-Robinson was not the fore-person and was not even a juror.

On June 22, 2001, this Court ordered Attorney Steingold to appear and show cause as to why he should not be sanctioned for recklessly or in bad faith filing a motion for a new trial because the most basic inquiry under the circumstances would have revealed that his allegations as to Ms. Williams-Robinson had no evidentiary support. This Court also subpoenaed Krystal Butterfield, the affiant who supported Attorney Steingold's contentions.

This Court subsequently received a letter from Attorney Steingold dated June 21, 2001 and addressed to Assistant United States Attorney Mark C. Jones. In that letter, Attorney Steingold stated that,

> Prior to sentencing, I was contacted by several individuals who swore that a young lady name[d] Terrina May had discussed the trial in which her mother was a sitting juror. No-one was quite certain of the mother's last name as she had been married numerous times, but they all insisted that she was on the Wheeler jury and had made statements that you saw in the motion. At first I was informed that Ms. May was going to come forward but had discussed with an attorney the serious consequences her mother would face if she violated her oath, and she changed her mind. I was then given by no less than four (4) persons, the details of the events that took place, as described in the motion. Everyone was willing to sign an affidavit and, in fact, I was in the process of arranging to meet with several of the other individuals when the misidentification of the juror came to light.

> I had advised all of these people of the serious consequences of making a false statement, and suggested that they speak to an attorney before becoming a witness. All indicated they were telling the truth about Terrina May and wanted to testify in an effort to force Ms. May to tell the truth.
>
> Part of the problem with the misidentification was mine. I have enclosed a copy of my chart in which you will see, that I failed to note Ms. Marcella Williams-Robinson as having been peremptoried out. . . .
>
> I have withdrawn the motion and have informed Mr. Wheeler, in no uncertain terms, that I would not be filing another motion to dismiss or any other motion. I intend to ask someone else to be appointed to represent Mr. Wheeler on appeal.
>
> It may well be that the person who is the mother of Terrina May was on the jury. If that person can be identified, I suspect that some other attorney may file a motion as, if the allegations are true, they certainly are serious and there needs to be some inquiry. I feel somewhat victimized and tremendously embarrassed over misidentifying the juror as well as indicating that she was the foreperson. For that I offer you my sincere apology.

(Letter from David S. Steingold to Mark C. Jones, June 21, 2001.)

At the hearing before this Court on July 12, 2001, Attorney Steingold stated on the record that before filing the motion he never confirmed whether the person identified by name in the motion actually was a juror, nor did he investigate the veracity of the representations on which

the motion was based. In particular, he never attempted to contact Ms. May. Furthermore, Attorney Steingold obtained Butterfield's signature in Flint on the day of Defendant's sentencing but did not have his associate "notarize" it with false representations until he returned to his office in Detroit at some later time. Also after the affidavit was signed, Attorney Steingold added information to the first unsigned page of the affidavit of which the affiant had no knowledge. Krystal Butterfield testified that she never appeared before a notary public – on the day she signed the affidavit or any other time in her life. In addition, Butterfield testified that she had never represented to Attorney Steingold that Ms. May was the daughter of Ms. Williams-Robinson, and the statement that "Ms. Terinna May [is] the daughter of Ms. Williams-Robinson" was not in the version of the affidavit that she signed. In short, Attorney Steingold submitted a bogus affidavit that he supplemented without the affiant's knowledge based on hearsay about hearsay that he failed to investigate in the least.

On July 16, 2001, Attorney Steingold filed "Defense Counsel's Supplemental Memorandum in Response to Order to Show Cause." In that Supplemental Memorandum, Attorney Steingold states that he was skeptical of the allegations that a juror engaged in improper conduct and reiterated that he sought to convey to everyone involved the importance and seriousness of the allegations. He acknowledged that he should have investigated the underlying facts and that his "failure to do so was negligent, but not willful," (Supp. Mem. at 4), and "certainly was not done with any malicious intent" (*id.* at 6). Attorney Steingold stated that, "[m]y greatest fault in this situation was in taking anyone's word for anything in this

type of situation." (Supp. Mem. at 4.) He concluded by stating that, "[o]ften, timing makes it impossible to have a notary physically present when a document is signed," although he reassured the Court that he "certainly will never engage in such a practice in the future." (Supp. Mem. at 7.)

Discussion

The Court may require an attorney to "satisfy personally the excess costs, expenses, and attorneys' fees" reasonably incurred as a result of multiplying the proceedings in a case "unreasonably and vexatiously." *See* 28 U.S.C. § 1927. Moreover, it is well settled that courts have inherent authority to impose sanctions on an attorney for reckless or bad faith conduct during the course of litigation. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-50 (1991); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766-67 (1980); *United States v. Wallace,* 964 F.2d 1214, 1217-18 (D.C. Cir. 1992).

"Recklessness is defined as more than mere negligence but less than intent." *In re Champion Enterprises, Inc., Securities Litigation,* 144 F. Supp. 2d 848, 858 (E.D. Mich. 2001) (citing *Mansbach v. Prescott, Ball & Turben,* 598 F.2d 1017, 1024 n.36 (6th Cir. 1979)); *see* Black's Law Dictionary (7th ed. 1999) (defining "recklessness" as involving "a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing"); *see also Smith v. Wade,* 461 U.S. 30, 45 (1983) (describing recklessness as short of actual malicious intent). The Sixth Circuit has defined "recklessness" as "highly unreasonable conduct which is an extreme departure from the standards of ordinary care." *Ohio Drill & Tool Co. v. Johnson,* 625

F.2d 738, 741 (6th Cir. 1980); *see* Black's Law Dictionary (7th ed. 1999) (defining "recklessness" as "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk").

This Court finds that Attorney Steingold's behavior rises to the level of recklessness. By his own admission, Attorney Steingold was negligent; he breached the duties he owes his client, the Government, and this Court. While his conduct may not have been with malicious intent, this Court finds that it also was more than merely negligent. For all his warnings to everyone involved, Attorney Steingold failed to appreciate the seriousness of his own actions in leveling charges of misconduct in a public document against a mis-identified juror, failing to undertake the most basic investigation of the underlying facts, supplementing an affidavit after it was signed to include information of which the affiant has no knowledge, and arranging a false notarization by his associate. Such conduct was highly unreasonable and an extreme departure from the standards of behavior expected of attorneys who practice before the federal courts.

Therefore, the Court concludes that the Motion for a New Trial was submitted recklessly and that Attorney Steingold should be sanctioned, accordingly, as follows. First, Attorney Steingold is required personally to pay the costs, expenses, and attorneys' fees incurred by the Government in responding to the motion, pursuant to 28 U.S.C. § 1927. Second, he is required personally to pay $2,500 to the Court as a sanction for reckless conduct. Third, he is required to file a certification with this Court that he has submitted a copy of this Order to Chief Judge Lawrence P. Zatkoff of the United States District Court for

the Eastern District of Michigan and the Attorney Grievance Commission of the State of Michigan.

Finally, the Court notes that in spite of the alleged quantity of evidence and gravity of the claims underlying this fiasco, Attorney Steingold has not sought to correct the motion with reliable and credible support but, from all outward appearances, has abandoned the effort altogether.

Conclusion

Accordingly, this Court being fully advised in the premises,

IT IS HEREBY ORDERED that Attorney David S. Steingold must personally pay the costs, expenses, and attorneys' fees incurred by the Government responding to Defendant's motion for a new trial. The Government must file an accounting of the costs, expenses, and attorneys' fees within 14 days of entry of this Order, and Attorney Steingold may file a response to that accounting within 14 days of the filing of that accounting.

IT IS FURTHER ORDERED that, within 30 days of the entry of this Order, Attorney Steingold must submit to the Clerk of the Court a certified check or money order made payable to the "Clerk of the Court" in the amount of $2,500.00 as a sanction for reckless conduct.

IT IS FURTHER ORDERED that, within 30 days of the entry of this Order, Attorney Steingold must file a certification with this Court that he has mailed a copy of this Order to Chief Judge Lawrence P. Zatkoff of the United States District Court for the Eastern District of Michigan and the Attorney Grievance Commission located

at 243 W. Congress, Suite 256, Marquette Building, Detroit, Michigan 48226.

SO ORDERED.

Dated: Aug. 15, 2001 /s/ Paul V. Gadola
HONORABLE
PAUL V. GADOLA
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUDIE DENVER WHEELER,

Defendant.
_____/

CRIMINAL CASE NO. 00-50032-01

HONORABLE PAUL V. GADOLA U.S. DISTRICT JUDGE

VERDICT FORM

(Filed Oct. 26, 2000)

We, the jury, by unanimous verdict, find the defendant, Audie Denver Wheeler:

	Not Guilty	Guilty
Count One:	____	X

If you find the defendant guilty of conspiracy to distribute controlled substances, please state your unanimous verdict as to the purpose of the conspiracy:

____ The distribution of cocaine.

X The distribution of marijuana.

____ Both.

If you find the defendant guilty of conspiracy to distribute controlled substances with the distribution of *cocaine* as a purpose of the conspiracy, then state your unanimous verdict as to the quantity of cocaine for which he should be held accountable as reasonably foreseeable to him in furtherance of the jointly undertaken activity:

____ Less than 500 grams (½ kilogram) of cocaine

____ 500 grams to less than 5 kilograms of cocaine

____ 5 kilograms or more of cocaine

If you find the defendant guilty of conspiracy to distribute controlled substances with the distribution of *marijuana* as a purpose of the conspiracy, then state your unanimous verdict as to the quantity of marijuana for which he should be held accountable as reasonably foreseeable to him in furtherance of the jointly undertaken activity:

____ Less than 100 kilograms of marijuana

__X__ 100 kilograms to less than 1000 kilograms of marijuana

____ 1000 kilograms or more of marijuana

	Not Guilty	Guilty
Count Two:	____	X
Count Three:	____	X

	Not Guilty	Guilty
Count Five:	____	X
Count Six:	X	____
Count Seven:	____	X
Count Eight:	____	X

Dated: OCTOBER 26, 2000 /s/ Kevin M. Berryman
Foreperson